Supreme Court, U.S.
FILED

95-236 AUG 9 1995

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROBERT HILL,
PETITIONER
v.
CITY OF CHESTER, PENNSYLVANIA; THE CITY COUNCIL OF THE CITY OF CHESTER; ANNETTE BURTON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS COUNCILWOMAN OF THE CITY OF CHESTER; AND CHARLES McLAUGHLIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COUNCILMAN OF THE CITY OF CHESTER,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do persons convicted of crimes, who paid their debt to society and returned to the community, constitute a "suspect class" for equal protection purposes in light of the historical record of discrimination against such persons and the complete political powerlessness and vulnerability that they suffer, unique among all minorities?

2. Has Petitioner met the "rational basis" standard of equal protection analysis where the Respondent City Council voted to oust Petitioner from his secretarial job with the City of Chester

because of public pressure brought against them regarding Petitioner's criminal record as a young man two decades earlier, thereby giving effect to the unsubstantiated stereotyping and prejudice of their constituents in violation of this Court's teachings in **City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985)**?

3. May conspiracies motivated by other than racial bias be actionable under **42 U.S.C. §§ 1985(3) and 1986**, a question left open by this Court in **Griffin v. Breckenridge, 403 U.S. 88 (1971)**?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	15
I. CONVICTED FELONS SHOULD BE DEEMED A SUSPECT CLASS UNDER EQUAL PROTECTION ANALYSIS.	15
II. PETITIONER HAS MET THE RATIONAL BASIS STANDARD OF EQUAL PROTECTION REVIEW AS A MATTER OF LAW.	28
III. CLASSES OTHER THAN RACE CAN BE THE PREDICATE FOR A CLAIM UNDER 42 U.S.C. §§ 1985(3) AND 1986.	53
CONCLUSION	59

APPENDIX:

Memorandum of the Honorable J.M. Kelly dated March 18, 1993 A-1

Order of the Honorable J.M. Kelly dated June 10, 1993 A-43

Memorandum of the Honorable J.M. Kelly dated August 26, 1994 A-45

Judgment Order of the United States Court of Appeals for the Third Circuit dated May 5, 1995 A-91

TABLE OF AUTHORITIES

CASES

	PAGE
Americans United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992)	42
Baer v. City of Wauwatosa, 716 F.2d 1117 (7th Cir. 1983)	22
Butts v. Nichols, 381 F.Supp. 573 (S.D. Iowa 1974)	46,47
Cammermeyer v. Aspin, 850 F.Supp. 910 (W.D.Wash. 1994)	33-34
Carbonaro v. Reeher, 392 F.Supp. 753 (E.D. Pa. 1975)	40

Christian Knights of the KKK v. District of Columbia, 919 F.2d 148 (D.C.Cir. 1990) 42

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985) ii,14,19, 29,31,32,33, 34,36,37,39, 44,53

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) 42

Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978) 51

de Botton v. Marple Tp., 689 F.2d 477 (E.D. Pa. 1988) 57

DeVeau v. Braisted, 363 U.S. 144 (1960) 24

Furst v. New York City Transit Authority, 631 F.Supp. 1331 (E.D. N.Y. 1986) 50

Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), cert. denied 423 U.S. 930 58

Gregg v. Lawson, 732 F.Supp. 849 (E.D. Tenn. 1989) 51

Griffin v. Breckenridge, 403 U.S. 88 (1971) ii

Griffin High School v. Illinois High School Ass'n., 822 F.2d 671 (7th Cir. 1987) 39

Hilliard v. Ferguson, 30 F.3d 649 (5th Cir. 1994) 22

Hobson v. Wilson, 737 F.2d 1
(D.C. Cir. 1984),
cert. denied
470 U.S. 1084
(1985) 58

Hunter v. Port Authority of
Allegheny Cty.,
277 Pa.Super. 4,
419 A.2d 631
(1980) 26,46

Keating v. Carey,
706 F.2d 377
(2d Cir. 1983) 58

Kindem v. City of Alameda,
502 F.Supp. 1108
(N.D. Ca.
1980) 48

Larson v. Miller,
No. 94-2691,
1995 WL 322525
at *6 (8th Cir.,
May 31, 1995) 54

Lewis v. Alabama Dept. of Public Safety, 831 F.Supp. 824 (M.D. Ala. 1993) 50

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 36

Loving v. Virginia, 388 U.S. 1 (1967) 17

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 25,59,60,62

NAACP v. Alabama, 357 U.S. 449 (1958) 17

NAACP Legal Defense & Educ. Fund, Inc. v. Devine, 727 F.2d 1247 (D.C.Cir.1984), rev'd on other grounds sub nom 42

Owens v. Barnes,
711 F.2d 25
(3d Cir. 1983) 21

Palmore v. Sidoti,
466 U.S. 429
(1984) 43,44

Plyler v. Doe,
457 U.S. 202
(1982) 18

Price v. Cohen,
715 F.2d 87
(3d Cir. 1982) 19

Richardson v. Miller,
446 F.2d 1247
(3d Cir. 1971) 58

Richardson v. Ramirez,
418 U.S. 24
(1974) 20,21,23

Roe v. Operation Rescue,
710 F.Supp. 577
(E.D.Pa 1989) 58

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 51

Secretary of Revenue v. John's Vending Corp., 453 Pa. 488, 309 A.2d 358 (1973) 27,28

Shapiro v. Thompson, 394 U.S. 618 (1969) 18

Smith v. Fussenich, 440 F.Supp. 1077 (D. Conn. 1977) 49,50

Steffan v. Perry, 41 F.3d 677 (D.C.Cir. 1994) 35

Terminiello v. Chicago, 337 U.S. 1 (1949) 41

United Brothers of Carpenters & Joiners of America, Local 610, AFL-CIO, et al. v. Scott, et al., 463 U.S. 825 (1983) 56

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 31,39

Upshaw v. McNamar, 435 F.2d 1188 (1st Cir. 1970) 21-22

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 31

Weinberger v. Salfi, 422 U.S. 749 (1975) 39

Statutes

18 Pa.C.S.A. §9125 26,49

28 U.S.C. §1254(1) 2

28 U.S.C. §1331	3
28 U.S.C. §1343	3
42 U.S.C. §1985	ii,53,54 55,56,58,63
42 U.S.C. §1986	ii,53
323 Pa.Code §11.3-305	4

Other Authority

"Disenfranchisement of Ex-Felons, A Reassessment," 25 Stanford L.Rev. 845 (1973)	23
"The Collateral Consequences of a Criminal Conviction," 23 Vanderbilt L.Rev. 929 (1970)	24

Kenneth W. Simmons,
Overinclusion and Underinclusion: A New Model,
36 UCLA L. Rev. 447 (1989) 36

Harry Kalven, Jr.,
The Negro and the First Amendment
140-160 (1965) 42-43

OPINIONS BELOW

On March 18, 1993, the Honorable James McGirr Kelly of the United States District Court for the Eastern District of Pennsylvania granted defendants' Motion to Dismiss in an unreported Opinion [C.A.No. 92-CV-4357]. That Order was vacated on June 10, 1993, in response to plaintiff's Motion to Alter or Amend the Judgment. Finally, by Order of August 26, 1994, Judge Kelly granted defendants' Motion for Summary Judgment in an unreported Opinion. *See* Opinion and Order at Appendix, p. A-45.

The Court of Appeals for the Third

Circuit affirmed the decision in an unreported Judgment Order of May 11, 1995 [App. No. 94-1955]. *See* Judgment Order of the Court at Appendix, p. A-90.

JURISDICTION

On May 11, 1995, the United States Court of Appeals for the Third Circuit affirmed the grant of summary judgment to defendants [here respondents] in the court below by a Judgment Order.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to **28 U.S.C. § 1254(1)**.

Subject matter jurisdiction existed in the District Court pursuant to **28 U.S.C. §§ 1331 and 1343.**

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV, SECTION 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1992, following her fall election, Barbara Bohannan-Sheppard, the first African-American Mayor of the City of Chester, appointed Petitioner Robert Hill, to serve as her Administrative Assistant, a secretarial position. Pursuant to §305 of the Chester Home Rule Charter, **323 Pa.Code §11.3-305**:

> The Mayor may appoint an assistant to assist in the administration of the functions of the Mayor. The

> Administrative Assistant will serve at the pleasure of the Mayor, shall be qualified by education and/or experience to carry out the duties of the office, and shall be compensated by a salary which shall be set by Council in the Administrative Code or other ordinance.

Before the appointment, Robert Hill had informed the Mayor that he had a prior criminal record arising from a second degree homicide conviction when he was fourteen (14) years old and a statutory rape conviction approximately twenty (20) years before his appointment. Robert Hill had reformed himself in prison, had earned his high-school equivalency diploma, and had learned

administrative and secretarial skills. After his release from prison 16 years before his appointment, Robert Hill gained a reputation as an excellent legal secretary and administrator, and became an ordained minister in the faith of Islam. Because she knew of, and believed in, his reformation, Mayor Bohannan-Sheppard asked that he accept the position despite his prior criminal record.

The functions of the appointed position of Administrative Assistant were secretarial: Robert Hill helped develop the infrastructure of the Mayor's office,

calendared her events, typed her correspondence and answered her telephone. He was not a liaison, nor did he act in the Mayor's place as her representative.

Shortly after the election, it was revealed through a few newspaper accounts in two local papers that plaintiff had a criminal past. Plaintiff's former criminality was only further raised by a veteran Chester gadfly, the Reverend Horace Strand, who protested plaintiff's appointment at a Council meeting on January 30, 1992. While no

documentation of any other protest or interference with local political functioning has been produced, the record reflects that there were some complaints about plaintiff being employed in the Mayor's office.

On March 26, 1992, a regular meeting of the Council of the City of Chester was convened. Respondent Councilwoman Burton moved, without prior notice, for the removal of Robert Hill as an employee of the defendant, City of Chester. Mayor Bohannan-Sheppard protested, stating that only the Mayor had

the right of appointment or removal and that the suggested action was immoral:

> Mayor Bohannan-Sheppard said Section 305 in the Home Rule Charter states the Mayor has the power to hire the Chief of Police and her Administrative Assistant to serve at the pleasure of the Mayor. Shall be qualified by education or experience to carry out the duties of the office. Shall be compensated by a salary which shall be set by Council in the Administrative Code or other Ordinances. Mayor Bohannan-Sheppard said show me the justification of this action of dismissal of my Administrative Assistant. Robert Hill is qualified to hold this position, he is in the Mayor's Office, he is not in Parks and Recreation or Public Safety. The judicial system of the law of the land states that once a person has been convicted of a crime, then, that person has met the requirement of the law, then, that person has served the requirement and is to be considered to have paid his or

her debt to society. That person is afforded the same right as other citizens of the land. What message is the City Council sending to the citizens of the judiciary system that we said we would uphold if elected to office. What Council seems to be saying is that if your child makes a mistake and is convicted of a crime and pays his or her debt to society, he or she will never be accepted in society, at least not by them. I believe that if anyone who satisfactorily serves time under our system are [sic] entitled to be viewed as a citizen in good standing of the society in which that debt was payed [sic]. We are here to serve you, Council is not here to project what they want to do.

Minutes of the Chester City Council Meeting of March 26, 1992.

Contrary to the requirements of the Home Rule Charter, no advance notice was given regarding these actions and the

action was effected by mere motion instead of ordinance, which requires a ten day notice and publication in two newspapers of general circulation. Robert Hill was not advised that the action was going to be taken against him, and his supporters were not allowed to express their views on the matter.

After being advised by the City Solicitor that the Mayor was correct, that Council could not fire Robert Hill, Respondents, Councilpersons McLaughlin and Burton, moved to eliminate plaintiff's salary by setting it at zero dollars. Of the

three persons present and voting, the Mayor voted No and Respondents Burton and McLaughlin voted Yes. The motion was thus passed and Robert Hill effectively removed from his position.

The stated purpose of the individual Respondents of setting Petitioner's salary at zero dollars was to force Robert Hill to leave his employment with the City. The only reason given by the individual Defendants for their action was that the government of the City was being harmed by the perceived uproar over Petitioner's criminal past if he continued in the

position of Administrative Assistant. However, neither individual Defendants believed the position to be a powerful or sensitive one, only that the public *perceived* it to be so.

The District Court agreed with Respondents and found Petitioner's criminal record of twenty years earlier and the public reaction to it to be the reason for Petitioner's firing. The Court of Appeals for the Third Circuit affirmed.

Petitioner has brought this matter to this Court to decide the issue of whether convicted felons are a suspect class for

equal protection analysis and, if they are not, whether the District Court and the Court of Appeals erred in finding that Respondents violated Petitioner's equal protection rights by putting into effect the prejudices of their constituents in violation of the "rational relationship" standard of equal protection analysis as set forth in **City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985),** in that effectuating the prejudices of constituents would not be a legitimate governmental purpose.

ARGUMENT

I. CONVICTED FELONS SHOULD BE DEEMED SUSPECT CLASS UNDER EQUAL PROTECTION ANALYSIS.

Under the terms of the Fourteenth Amendment to the United States Constitution, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is, therefore, contrary to Constitutional mandates for any state or political subdivision thereof to deny to any individual the same protections afforded to others based upon his or her inclusion in a class of persons having a common identity.

To establish a violation of the Equal Protection Clause, a plaintiff must show that the categorization used by defendants to deny him or her equal rights provided to others invidiously discriminates against a disfavored group to which he belongs, without legitimate governmental purpose. A court's examination and balancing of individual and governmental interests requires different levels of deference to be shown to the state-created categories according to the group discriminated against and the right or interest infringed.

The highest level of scrutiny, known as

"strict scrutiny," applies to classifications infringing upon fundamental rights, such as freedom of association, **NAACP v. Alabama, 357 U.S. 449 (1958)**, and to those which are inherently suspect because they inordinately burden a group of citizens traditionally victimized by discrimination. The archetypal examples of this sort of group are racial minorities. **Loving v. Virginia, 388 U.S. 1 (1967)**. Under this level of scrutiny, the denial of equal protection will not pass constitutional muster unless it is necessary to advance a "compelling state interest."

Shapiro v. Thompson, 394 U.S. 618 (1969).

The next level, "intermediate scrutiny," applies to classifications affecting less fundamental rights, such as commercial speech, and to classifications which are not so suspect. Actions affecting these sensitive categories must be "substantially related to the achievement of governmental objectives" to pass constitutional muster. **Plyler v. Doe, 457 U.S. 202 (1982).** Classes considered suspect under "intermediate" or "middle tier" levels of scrutiny include alienage,

gender or illegitimacy. *See* **Price v. Cohen, 715 F.2d 87, 92 (3d Cir. 1982).**

The third level, employing the least scrutiny, requires the application of the "rational relationship" test. It applies to all other governmental classifications. To be protected under minimal scrutiny, classifications "must be rationally related to a legitimate governmental purpose." **City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985).**

Petitioner strongly urges that convicted felons should be considered a suspect class and that strict scrutiny is

necessary to any equal protection analysis in regard to them.

This Court has never determined the issue of the status of convicted felons under equal protection analysis. In **Richardson v. Ramirez, 418 U.S. 24 (1974),** the disenfranchisement of convicted felons was found not to be unconstitutional. That decision, however, was based upon Section 2 of the Fourteenth Amendment, which provides for reduced representation "when the right to vote at any election...is denied...*except for participation in rebellion,*

or other crime" (emphasis supplied). This Court rested its conclusion that the state may disenfranchise felons on

> the demonstrably sound proposition that §1, dealing with voting rights as it does, could not have meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which §2 imposed for other forms of disenfranchisement.

Richardson v. Ramirez, 418 U.S. at 55.

See also **Owens v. Barnes, 711 F.2d 25, 26 (3d Cir. 1983).**

While several lower courts have stated that convicted felons are not within a suspect class for equal protection purposes [**Upshaw v. McNamar, 435 F.2d**

1188, 1190 (1st Cir. 1970); Baer v. City of Wauwatosa, 716 F.2d 1117, 1125 (7th Cir. 1983); Hilliard v. Ferguson, 30 F.3d 649, 652 (5th Cir. 1994)], the statement of that status is made flatly and without any stated reasoning behind the decision. It is respectfully suggested that contrary to the holding of the court below and of the other lower courts who have stated the proposition without analysis, Petitioner Hill was a member of a suspect class entitled to the highest level of protection.

Robert Hill is a member of that class of persons convicted of felonies who have

paid their debt to society and are now again members of the community. He is a member of a class of persons traditionally among the most politically powerless in the most fundamental of ways, often being constitutionally denied the right to vote. **Richardson v. Ramirez, 418 U.S. 24 (1974).** ***See*** **Note: "Disenfranchisement of Ex-Felons, A Reassessment," 25 Stanford L.Rev. 845 (1973).** In addition to the right to vote, ex-convicts may lose passport rights, the ability to hold public office, the capacity to testify, the capacity to serve as a juror, and the capacity to

serve as a court-appointed fiduciary or guardian. They may suffer the loss of domestic rights of various kinds, and possibly the loss of insurance, pensions, or workers' compensation benefits, or even the right to inherit. *See* **"The Collateral Consequences of a Criminal Conviction," 23 Vanderbilt L.Rev. 929 (1970).** *See also* **DeVeau v. Braisted, 363 U.S. 144, 158-159 (1960)**(listing further handicaps and deprivations).

This Court's definition of a suspect class for purposes of equal protection analysis is a broad one:

> A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process[,]" . . . [or those that have] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)(internal citations omitted).

Ex-convicts are exactly a group of this sort. They probably are the last group whom it is considered respectable to disrespect. Indeed, in Pennsylvania, ex-convicts are considered so in need of protection in finding and keeping

employment that they are the specific object of a statute making employment discrimination against them illegal. See **18 Pa.C.S.A. § 9125** which is rooted in Article 1, Section 1 of the Constitution of the Commonwealth of Pennsylvania:

> Felony and misdemeanor convictions may be considered by the employer [re: employment] only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied."

18 Pa.C.S.A. § 9125(b).

See also **Hunter v. Port Authority of Allegheny Cty., 277 Pa.Super. 4, 419 A.2d 631 (1980)** (discrimination against ex-

convict by public employer found unconstitutional in Pennsylvania) and **Secretary of Revenue v. John's Vending Corp., 453 Pa. 488, 309 A.2d 358 (1973)**(convicts as victims of stereotyping):

> [T]he deeply ingrained public policy of this State [is] to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders. This State in recent years has been unalterably committed to rehabilitation of those persons who have been convicted of criminal offenses. To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for past errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.

Secretary of Revenue v. John's Vending

Corp., *supra*, at 362.

The District Court below, affirmed by Judgment Order of the Court of Appeals for the Third Circuit, found as a matter of law that "[Robert Hill's] status as a convicted felon does not place him in a suspect class." **Memorandum of Judge Kelly at pp. 12-13** [App. p. A-74]. Petitioner respectfully suggests that this conclusion is improper and urges this Court to examine and resolve the issue.

II. PETITIONER HAS MET THE RATIONAL BASIS STANDARD OF EQUAL PROTECTION REVIEW AS A MATTER OF LAW.

Assuming arguendo that the court

below was correct that ex-felons are not a "suspect class" requiring the higher "strict scrutiny" standard of equal protection analysis, it is still clear that the actions against Robert Hill as an ex-felon in this case do not satisfy even the minimum standard of equal protection, the "rational basis" standard, as set forth in this Court's decision in **City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985).**

The "rational basis" argued by Defendants and accepted by the court below was that Defendants reasonably

"did not want a convicted felon and highly controversial figure to be in the sensitive position of Administrative Assistant to the Mayor" [**Memorandum of Judge Kelly at pp. 13-14**][App. p. A-76], and that "the substantial or motivating factor in [Robert Hill's] termination . . . was [his] prior criminal record and the public reaction thereto" [**Memorandum of Judge Kelly at p. 6**][App. p. A-57]. Respondent Councilwoman Burton clearly testified that it was the view of her constituents and not her own perceptions which controlled her actions.

In defining the basic inquiry of the rational basis test, this Court has stated that to be protected under minimal scrutiny, classifications "must be rationally related to a legitimate governmental purpose." **City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985).** However, simply discerning any legislative reason will not serve to satisfy the rational basis requirement. See **United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).** Accordingly, the

Respondents' adherence to the irrational views of the voters of the City of Chester cannot be condoned. In **City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985)**, this Court took exception to the City's contention that the exclusion of group homes for the retarded from the City through zoning regulations was necessary because of the public's perception of retarded persons:

> First, the [City] Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the [group home], as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are

> properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause . . . and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect" . . . [D]enying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation.

City of Cleburne, Tex. v. Cleburne Living Center, *supra*, 473 U.S. at 448-449 (citation omitted).

See also **Cammermeyer v. Aspin, 850**

F.Supp. 910, 917 (W.D.Wash. 1994)("If the policy is shown to be based solely on prejudice, it cannot survive rational basis review"):

> "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *See* **Zobel v. Williams, 457 U.S. 55, 61-63 (1982); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 535 (1973).** Furthermore, some objectives --such as "a bare...desire to harm a politically unpopular group," ***id.*, at 534**--are not legitimate state interests.

Cleburne, 473 U.S. at 446-447.

Indeed, were this not the case "rationality review would be tantamount to no review at all -- a result manifestly

inconsistent with Supreme Court precedent." **Steffan v. Perry, 41 F.3d 677, 709 (D.C.Cir. 1994)(Wald, J., dissenting).**

As Justice Blackmun has reminded, the standard, while not difficult to meet, prohibits irrational objectives:

> [f]or over a century, the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise nature of the Equal Protection Clause's guarantees. At the minimum level, however, the Court "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." This is not a difficult standard for a State to meet when it is attempting to act sensibly and in good faith. But the "rational-basis standard is 'not a toothless one,'"; the classificatory scheme must "rationally advanc[e] a

> reasonable and identifiable governmental objective."

Logan v. Zimmerman Brush Co., 455 U.S. 422, 439 (1982)(citations omitted)

Cleburne, ***supra***, and its progeny indicate that a rational basis for a discriminatory action against a Petitioner will not be found where the classification is likely to stigmatize or where the lack of fit between the means and the ends sought evidences the existence of an impermissible prejudice. ***See*** **Kenneth W. Simmons,** ***Overinclusion and Underinclusion: A New Model,*** **36 UCLA L. Rev. 447, 452-453 (1989).**

Here, the City Council of Chester and the other Respondents admittedly succumbed to the views of their constituents that a former convict should hold no position as a clerical assistant to the Mayor. These views reflect unsubstantiated fear and prejudice of the kind found impermissible in **Cleburne**. They represent today's passing wave of meanspiritedness and intolerance in regard to convicts. Succumbing to the unsubstantiated prejudices of Respondents' constituents and giving them the imprimatur of the State is

impermissible because it rests upon, and in turn reinforces, the stigmatizing stereotypes. Such State imprimatur against convicts acts to perpetuate habitual assumptions by blocking the exposure of the community involved to the experiences that might have led them to conclude that convicted felons who have paid their debt to society and have returned to the community can be responsible citizens and can be fine workers in private or public employment:

> . . . If the Constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare Congressional desire to

> harm a politically unpopular group cannot constitute a *legitimate* governmental interest [under the rational basis test].

U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)(emphasis in original).

Similarly see **City of Cleburne, Tex. v. Cleburne Living Center,** *supra* (re: the retarded); **Weinberger v. Salfi, 422 U.S. 749, 772 (1975); Griffin High School v. Illinois High School Ass'n., 822 F.2d 671, 675-76 (7th Cir. 1987)**("Even under the rational basis test, however, a regulation may violate the Equal Protection Clause if it can be shown that the sole purpose of the regulation was the desire to injure a

particular class of persons").

The United States District Court for the Eastern District of Pennsylvania has specifically held that the public's desire that ex-felons not be granted a governmental benefit could not constitute a legitimate state purpose under the rational basis test:

> The state argues that, as a political reality, the legislature would not establish any assistance program at all unless it contained the provisions allowing the agency [the PHEAA] to deny felons aid. We reject this . . . basis, since political considerations do not constitute a legitimate state purpose.

Carbonaro v. Reeher, 392 F.Supp. 753, 757 (E.D. Pa. 1975).

Giving State sanction to the prejudices of their constituents, as Respondents did here, parallels the "heckler's veto" usually noted in the First Amendment context. The First Amendment forbids the government to silence speech based on the reaction of a hostile audience, unless there is a "clear and present danger" of grave and imminent harm. ***See, e.g.,*** **Terminiello v. Chicago, 337 U.S. 1, 4 (1949).** Otherwise, a vocal minority (or even majority) could prevent the expression of disfavored viewpoints--a result contrary to the central purpose of

the First Amendment's guarantee of free expression. *See* **Christian Knights of the KKK v. District of Columbia, 919 F.2d 148, 150, 152-53 (D.C.Cir.1990)(Edwards, J., concurring; Wald, J., dissenting); NAACP Legal Defense & Educ. Fund, Inc. v. Devine, 727 F.2d 1247, 1261-62 (D.C.Cir.1984), rev'd on other grounds sub nom.; Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985); Americans United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir.1992); Harry Kalven, Jr., The Negro**

and the First Amendment, 140-160 (1965). These constitutional principles mandate that government may not disadvantage a person on the basis of his status or his views solely for fear that others may be offended or angered by them. This Court's decision in **Palmore v. Sidoti, 466 U.S. 429 (1984)** set forth a parallel principle. There, the court below gave custody of a white child to the child's father when the mother married a black man. The lower court's reasoning was that it was in the best interests of the child that he not be subjected to the

prejudices of others were he to remain in an interracial family. This Court disagreed:

> [t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Palmore v. Sidoti, 466 U.S. at 433.

Courts cannot, as a matter of law, give effect to irrational private biases under **Cleburne** and **Palmore**. Since that is exactly what was done by respondents here, the affirmance by the Court of Appeals of the District Court's allowance of respondents' acts, should be vacated

and the case remanded.

Robert Hill has also demonstrated that the rational relationship test was not met since his criminal record had no rational relationship to the secretarial job at issue. Certainly the rational relationship standard is not met where an individual's status as an ex-convict can have no rational connection to his secretarial duties as an aid to a municipality's executive officer. Several Pennsylvania decisions, and several federal decisions elsewhere, have determined that there is no rational relationship between a former

criminal conviction and the duties of most occupations. *See* **Hunter v. Port Authority of Allegheny County, 277 Pa.Super. 4, 419 A.2d 631, 638 (1980)** (denial of employment to ex-convict as bus driver was unconstitutional, holding that "when a public employer denies employment to an individual because of his criminal record, the employer's denial of employment must be *reasonably related* to the furtherance of a legitimate public objective"); **Butts v. Nichols, 381 F.Supp. 573 (S.D. Iowa 1974)** (unlimited prohibition against employment of convicted felons in civil service

positions in the state was a violation of equal protection):

> [t]here is no doubt that the State could logically prohibit and refuse employment in certain positions where the felony conviction would directly reflect on the felon's qualifications for the job (e.g., conviction of embezzlement and a job requiring the handling of large sums of money). . . . [Here] there is simply no tailoring in an effort to limit these statutes to conform to what might be legitimate state interests.
>
> . . . No consideration is given to the nature and seriousness of the crime in relation to the job sought. The time elapsing since the conviction, the degree of the felon's rehabilitation, and the circumstances under which the crime was committed are similarly ignored.

Butts v. Nichols, 381 F.Supp. at 580, 581.

See also **Kindem v. City of Alameda, 502 F.Supp. 1108 (N.D. Ca. 1980)**(re: city charter which prohibited municipal employment of all ex-felons. The court stated that even under the "low threshold" of rational basis evaluation, it could not accept the ex-felon prohibition).

Again evaluating a statute which barred ex-felons from employment with licensed private detective agencies and security guard agencies under the rational basis test, the United States District Court for the District of Connecticut has found the statute violative of equal protection:

> [the statute] fails to consider probable and realistic circumstances in a felon's life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances relating to the nature of the crime and degree of participation.

Smith v. Fussenich, 440 F.Supp. 1077, 1080 (D. Conn. 1977).

That court largely posited its decision on the Connecticut statute which prohibited employers (other than law enforcement departments) from rejecting applicants solely because of a prior conviction of a crime, a statute very similar to the controlling provisions of **18 Pa.C.S.A. §9125** herein:

> The irrationality of the enactment

> becomes most pronounced when it is compared with [the statute noted above].

Smith v. Fussenich, 440 F.Supp. at 1080.

See also **Furst v. New York City Transit Authority, 631 F.Supp. 1331 (E.D. N.Y. 1986)**(policy of discharging ex-felon violative of equal protection under rational basis test); **Lewis v. Alabama Dept. of Public Safety, 831 F.Supp. 824, 826 (M.D. Ala. 1993)**(noting that "simply discerning any regulatory reason, however plausible, will not serve to satisfy the rational basis requirement," court found a violation of equal protection in a statute

which disallowed the placement of ex-felons on a list of wrecker operators to be called on a rotating basis by the state troopers); **Gregg v. Lawson, 732 F.Supp. 849, 854 (E.D. Tenn. 1989)** (citing **Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)** -- "any qualification or requirement must bear a rational relation to the person's fitness to engage in the occupation or business [at issue]"); and **Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978)**(City of Philadelphia refused to hire applicants with prior histories of drug abuse, without regard to the applicant's

qualifications, present rehabilitative status, or nature of the job for which they had applied. The court held that equal protection was violated because no consideration was given to individual factors such as recent employment history, successful maintenance on a methadone program, or evidence of freedom from drug use and declared the policy overbroad and irrational).

As the several decisions cited indicate, the District Court in this case, and the Court of Appeals for the Third Circuit in affirming, took too narrow a view of this

Court's teachings in **Cleburne**, *supra*, and the standard under **Cleburne** as it applies to the claims of Robert Hill should be clarified.

III. CLASSES OTHER THAN RACE CAN BE THE PREDICATE FOR A CLAIM UNDER 42 U.S.C. §§ 1985(3) AND 1986.

There is a split in the Circuit Courts of Appeal on the issue of whether §1985(3) liability can be based on actions demonstrating bias against a class other than one based on race. In contradistinction to the holding of the District Court in this case, affirmed by Judgment Order of the Third Circuit, the

Court of Appeals for the Eighth Circuit has recently held that "Sec. 1985(3)'s reach extends beyond racial animus." **Larson v. Miller, No. 94-2691, 1995 WL 322525 at *6 (8th Cir., May 31, 1995).** The Court there found that the class of handicapped females was a class of persons reached by §1985(3). Petitioner believes that the class of convicted felons who have paid their debt to society and returned to the community is also entitled to the protections of that statute.

The provisions of 42 U.S.C. §1985(3) state in applicable part as follows:

> If two or more persons in any state or territory conspired . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §1985(e).

The four elements of a cause of action for a claim brought pursuant to the provisions of 42 U.S.C. § 1985(3) are

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law or equal privileges or immunities under the law; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Brothers of Carpenters & Joiners of America, Local 610, AFL-CIO, et al. v. Scott, et al., 463 U.S. 825, 829 (1983).

Petitioner Hill charged that there was a conspiracy against him as a member of the class of persons who had been convicted of a felony and who had paid their debt to society and returned to the community.

Unlike a § 1983 claim, a § 1985

conspiracy must arise from a racial or otherwise class-based motivation. While discriminatory purpose is not presumed and intentional discrimination must be shown [**de Botton v. Marple Tp., 689 F.2d 477, 482 (E.D. Pa. 1988)**], claims based on other than racial discrimination will be allowed:

> [a]lthough the Supreme Court in Griffin [v. Breckenridge, 403 U.S. 88 (1971)] left open the question whether conspiracies motivated by something other than racial bias would be actionable under § 1985(3), the Third Circuit answered this question in the affirmative in Novotny v. Great American Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1243-44 (3d Cir. 1978), vacated on other grounds, 442 U.S. 366 (1979). In Novotny, the Third Circuit

> held that sex discrimination falls within the categories of animus condemned by § 1985(3).

Roe v. Operation Rescue, 710 F.Supp. 577, 581 (E.D.Pa 1989).

See also **Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971)**(person who criticized employer for discriminatory practices protected under §1985(3)); **Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1084 (1985)**(anti-war and civil rights political organizations); **Keating v. Carey, 706 F.2d 377 (2d Cir. 1983)**(Republicans); **Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), *cert. denied* 423 U.S. 930, 975** (political

protestors).

The class of ex-convicts is certainly a suspect class as defined by the United States Supreme Court in **Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)**. The issue remains open and ripe for resolution at this time.

CONCLUSION

Ex-convicts should be considered a suspect class entitled to strict scrutiny of any discriminatory action against them by a governmental actor because they have a history of purposeful unequal treatment based on stereotyped characteristics and

have been relegated to a position of powerlessness within the political system since it is constitutionally permissible to deny them even the right to vote. As such, they should command extraordinary protection from the majoritarian political process as noted in **Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).**

Petitioner Robert Hill was terminated from his employment as the Administrative Assistant to the Mayor of Chester, Pennsylvania, because he had a record of criminal activity almost twenty

years before his discharge. The members of City Council of Chester improperly voted to terminate his employment because of political pressure by a small but vocal minority of the voters of Chester who suggested that Robert Hill, an admittedly skilled worker, should not be the Mayor's assistant solely because he had a criminal record, unrelated to the job he was hired to perform. This violated Petitioner Hill's right to equal protection.

Even if ex-convicts are not found to be a suspect class, the termination of an ex-

convict based on the unsubstantiated fears of the constituents of a governmental actor is not a *legitimate* governmental purpose. Further, the termination of an administrative secretary because of a thirty year old second degree homicide conviction bears no rational relationship to *any* governmental purpose. Certainly, the issues raised regarding the level of constitutional scrutiny to be applied to the class of tens of thousands of American felons who are released from prisons each year is one which requires prompt resolution by this Court.

Lastly, the class-based animus necessary to a §1985(3) claim can be based upon a class other than a racial one, *e.g.*, the class of convicted felons. The decisions of the Circuit Courts of Appeal are divided on this issue which can be resolved by the consideration of this Court.

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Dated: August 9, 1995

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT HILL	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CITY OF CHESTER, et al.	:	**NO. 92-4357**
	:	

MEMORANDUM

J. M. KELLY, J. **MARCH 18, 1993**

Presently before the court is Defendant's Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

Plaintiff, Robert Hill, a former Administrative Assistant to the Mayor of

the City of Chester, brought this action against the City of Chester, Pennsylvania ("Chester"), the City Council of Chester (the "City Council"), and Annette Burton and Charles McLaughlin, both members of the City Council.

In 1992, Barbara Bohannan-Sheppard, the Mayor of Chester (the "Mayor"), appointed Plaintiff to be one of her Administrative Assistants pursuant to the Mayor's power under the Chester Home Rule Charter.[1] An Administrative

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[1] In the context of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), this court is required to view the facts in the light most favorable to the nonmoving

Assistant's duties included organizing the office infrastructure, scheduling, answering telephones, attending and taking notes at meetings, and supervising the word processing work of the Mayor's office. The Mayor was aware at the time of the Plaintiff's appointment as an Administrative Assistant that Plaintiff had served a ten-year prison sentence for homicide charges brought when Plaintiff was fourteen years old, and that Plaintiff had also served a sixteen month prison sentence resulting

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party. Thus, this statement of facts was taken largely from Plaintiff's Complaint.

from charges of engaging in intercourse with a minor. While incarcerated, Plaintiff earned a G.E.D. (the equivalent of a high school diploma) and became proficient in typing and other office skills. In the years following Plaintiff's incarceration, he successfully pursued a career as a legal secretary/office manager and earned respect in the legal community in which he was employed. Plaintiff also married, had three children, and became a minister in the religion of Islam.

After Plaintiff's appointment as an Administrative Assistant, ministers of

various religions in Chester and other individuals protested the appointment, pressuring members of the City Council to terminate Plaintiff's employment. On March 26, 1992, Councilwoman Annette Burton ("Councilwoman Burton"), presented a motion before the City Council to remove Plaintiff from the City's payroll. This motion was seconded by Councilman Charles McLaughlin ("Councilman McLaughlin"). Councilwoman Burton withdrew her motion, however, after the Solicitor of Chester advised that the Administrative Assistant to the Mayor

served only at the pleasure of the Mayor, and therefore, the City Council did not have the authority to terminate Plaintiff. Subsequently, Councilwoman Burton moved instead to set Plaintiff's salary at zero, thereby effectively eliminating Plaintiff's continued employment with Chester. Councilwoman Burton's motion was seconded by Councilman McLaughlin, and the City Council voted two to one in favor of eliminating Plaintiff's salary. In addition, without any authority to do so, Defendants withheld Plaintiff's pay for work performed up to the time Defendants introduced and

passed the motion which eliminated his salary. Plaintiff subsequently resigned from his position with the Mayor.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. See, Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Johnsrud v. Carter, 620 F.2d 29, 33 (3d Cir. 1980). A court must determine whether the plaintiff would be entitled to relief under any set of facts which could be established in support of his claim. Conley, 355 U.S. at 45-46; Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990).

In reviewing a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the nonmoving party. See, Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); D.P. Enterprises, Inc. v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984).

Defendants argue that Plaintiff's Complaint fails to state a claim for violations of Plaintiff's right to freedom of association under the first and fourteenth

amendments to the United States Constitution. The United States Court of Appeals for the Third Circuit addressed the issue of a violation of a government employee's right to freedom of association in Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988). The court stated:

> Government employment does not require an employee to forego the exercise of the right to freedom of association. . . Employees, however, who claim that adverse employment action was taken against them based upon the exercise of their associational rights must show that they were engaged in constitutionally protect conduct, which conduct was a "substantial" or "motivating factor" in the government employer's decision.

> Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. at 287, 97 S.Ct. at 576.
>
> Two sometimes overlapping types of protected association have been recognized: associations founded on intimate human relationships in which freedom of association is protected as a fundamental element of liberty, and associations formed for the purpose of engaging in activities protected by the first amendment, such as the exercise of speech, assembly, and religion. Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462 (1984).

Id.

In light of the above law, this court finds that Plaintiff's Complaint fails to state a cause of action for breach of Plaintiff's

right of freedom of association. As indicated above, Plaintiff must assert that he was engaged in constitutionally protected conduct and that such conduct was a "substantial" or "motivating factor" in the decision to terminate Plaintiff's employment. It appears from Plaintiff's Complaint that the substantial or motivating factor in Plaintiff's termination was not Plaintiff's association with the Mayor, but instead, was Plaintiff's prior criminal record.

In addition, even if this court were to find that Plaintiff's Complaint adequately pleaded that Plaintiff's association with the

Mayor was a substantial or motivating factor in Plaintiff's termination, Plaintiff has failed to demonstrate that he was engaged in activities protected by the Constitution. In order to fulfill this requirement, Plaintiff must assert that Plaintiff's employment by the Mayor was an association afforded constitutional protection. Not all associations are protected by the constitution. As indicated in Rode, two types of associations have been recognized as requiring constitutional protection: associations founded on intimate human relationships, and those formed for the

purpose of engaging in activities protected by the first amendment, such as exercise of speech, assembly, and religion. Id.

Plaintiff's employment relationship clearly does not fall within the category of an association founded on an intimate human relationship. Moreover, Plaintiff's employment relationship with the Mayor implicates none of the protections afforded by the first amendment. Plaintiff's association with the Mayor was an association in the literal sense, but not an association "for the advancement of beliefs and ideas." NAACP v. Alabama, 357 U.S.

449, 460 (1958). Plaintiff was employed as an administrative assistant engaging in scheduling and office-related activities. Because Plaintiff performs these administrative functions for a political figure does not make plaintiff's job an association involving political expression, as the Plaintiff argues. This court finds that Plaintiff has failed to allege a breach of his right to freedom of association under the first and fourteenth amendments. Accordingly, Count I of Plaintiff's Complaint will be dismissed.

Defendants argue next that Counts II

and III of Plaintiff's Complaint fail to state a claim for violation of Plaintiff's liberty and property rights protected by the 14th amendment.[2] Plaintiff claims that the Defendants violated his liberty interest by violating his "personal privacy and reputation at the hands of persons clothed with the authority of the state."[3] This court must determine whether the claimed interests are within the 14th amendment's protection of liberty and property.

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[2] The Due Process Clause of the 14th Amendment provides: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law;. . . ." U.S. Const. amend. XIV.

[3] Plaintiff's Complaint at ¶ 46.

In Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), the United States Supreme Court determined that the 14th amendment did not require a hearing prior to the nonrenewal of a nontenured state teacher's contract unless the plaintiff could demonstrate that the nonrenewal deprived plaintiff of a liberty or property interest. The court held that the nonrenewal of plaintiff's contract was not tantamount to a deprivation of liberty, absent charges against him implicating his good name, reputation, honor, or integrity; and absent any stigma or disability

foreclosing other employment. Id. at 573-74. The Court stated that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he is simply not rehired in one job but remains as free as before to seek another." Id. at 575 (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895-96 (1961)). See Bishop v. Wood, 426 U.S. 341 (1976) (police officer's liberty interest not violated where false explanation given for dismissal and where reasons for discharge never made public).

In our case, Plaintiff claims that the City Council voted to reduce his salary to

zero because of Plaintiff's prior criminal record. Plaintiff does not allege that any of the Defendants accused Plaintiff of wrongdoing while employed by the Mayor. Plaintiff also does not claim that Defendants impugned his name, reputation, honor, or integrity in any way as a result of wrongdoing in Plaintiff's position as an Administrative Assistant. Also, there is no suggestion that the Defendants imposed a stigma on Plaintiff that foreclosed his freedom to seek other employment opportunities. The only stigma that may have resulted from Plaintiff's discharge was

based on Plaintiff's prior criminal record. Plaintiff has not alleged any facts which demonstrate that Defendants claimed improprieties on Plaintiff's part while employed as an Administrative Assistant that may have acted as a stigma to Plaintiff affecting his ability to obtain future employment. Thus, this court finds that Plaintiff has failed to state a claim for violation of Plaintiff's liberty interests guaranteed by the 14th amendment. Accordingly, Count II of Plaintiff's Complaint will be dismissed.

Plaintiff also claims that his due

process rights under the 14th amendment were violated because he had a property interest in his position as Administrative Assistant to the Mayor. In Roth, the Supreme Court defined a property interest protected by the 14th amendment as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> * * *
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or

> understands that stem from an independent source such as state law-rules or understandings that secure certain entitlement to those benefits.

Roth, 408 U.S. at 577. Thus, whether Plaintiff had a property interest recognized by the 14th amendment is determined by reference to state law. Id.; Bishop v. Wood, 426 U.S. 341, 344 (1976).

In Perry v. Sinderman, 408 U.S. 593, 601 (1972), the Court said that a "person's interest in a benefit is a 'property' interest for due process purposes if there are . . . rules or mutually explicit understandings that support his claim of entitlement to the

benefit and that he may invoke at a hearing." In Pennsylvania, absent an express statutory or contractual right granting tenure in public employment, a public employee remains "an employee at will who could be discharged at any time." Hoffman v. Montour County, 411 A.2d 1319, 1320 (Pa. Commw. Ct. 1980). In addition, Pennsylvania law provides that public employees have no contractual entitlement to dismissals only for cause unless the legislature has expressly provided tenure for a given class of employees. Rosenthal v. Rizzo, 555 F.2d 390, 392 (3d

Cir.) (citing Mahony v. Philadelphia Housing Auth., 320 A.2d 459 (1974), cert. denied, 419 U.S. 1122 (1975)), cert. denied, 434 U.S. 892 (1977).

In the case at bar, Plaintiff served in his position as Administrative Assistant at the "pleasure of the Mayor" and his salary was to be set by the City Council.[4]

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[4] Section 305 of the City of Chester Home Rule Charter provides:

> The mayor may appoint an assistant to assist in the administration of the functions of the Mayor. The Administrative Assistant will serve at the pleasure of the Mayor, shall be qualified by education and/or expertise to carry out

Plaintiff had no property interest in continued employment under the Chester Home Rule Charter because, serving at the "pleasure of the Mayor," Plaintiff had no legitimate claim of entitlement to continued employment with the Mayor. In addition, the City Council acted within its rights under the Chester Home Rule Charter in reducing Plaintiff's salary. To the extent that the City Council reduced Plaintiff's salary to an unreasonable level, Plaintiff can

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the duties of the office,
and shall be
compensated by a salary which shall be set by Council in the Administrative Code or other ordinance.

323 Pa. Code § 11.3-305 (1980)

pursue state law claims for relief. The City Council's reduction of Plaintiff's salary does not ipso facto grant Plaintiff a property right to continued employment protected by the Constitution. On the contrary, Plaintiff can pursue whatever remedies are available for unreasonable reduction in Plaintiff's salary by the City Council. This court finds that Plaintiff did not have a property interest in his employment as an Administrative Assistant with the City of Chester. Count III of Plaintiff's Complaint will be dismissed.

Defendants argue that Count IV of

Plaintiff's Complaint fails to state a claim for a violation of Plaintiff's equal protection rights under the 14th amendment. Plaintiff's Complaint alleges that Plaintiff was a member of a class of "persons convicted of felonies who have paid their debt to society and are now again members of the community," and that Defendants intentionally discriminated against Plaintiff because of his membership in that class.

The first step in evaluating an equal protection challenge to certain state action is to identify the level of scrutiny that must be applied. "Unless a statute provokes

'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate government purpose." Kadrmas v. Dickenson Public Schools, 487 U.S. 450, 457-58 (1988) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); Plyler v. Doe, 457 U.S. 202, 216-217 (1982); Lying v. Automobile Workers, 485 U.S. 360, 370 (1988)).

This court finds that Plaintiff's

employment with the Mayor did not implicate a fundamental right guaranteed by the Constitution, and Plaintiff, being a convicted felon, was not a member of a suspect class. Thus, the rational basis test is the applicable level of scrutiny to the state action involved here. See Schanuel v. Anderson, 546 F.Supp. 519, 524 (S.D. Ill. 1982) (rational basis test applied to challenge of state statute prohibiting employment in certain jobs of convicted felon for period of ten years following conviction), aff'd, 708 F.2d 316 (7th Cir. 1983); Carbonaro v. Reeher, 392 F.Supp.

753, 757 (E.D. Pa. 1975) (rational basis test applied to challenge of state statute that required former felons to prove satisfactory character to receive financial assistance for postsecondary education); Butts v. Nichols, 381 F.Supp. 573, 579 (S.D. Iowa 1974) (rational basis test applied to challenge of state statute prohibiting employment of convicted felons in civil service positions).

The rational basis test is defined as "whether the challenged state action rationally furthers a legitimate state purpose or interest." Rodriguez, 411 U.S. at 55. Thus, to withstand review, the Defendants

need only demonstrate that their actions in reducing Plaintiff's salary to zero because of his prior felony convictions, were rationally related to a legitimate state purpose. Defendants argue that the purpose for reducing Plaintiff's salary was because the Defendants did not want a convicted felon and "highly controversial figure" to be in the "sensitive position of Administrative Assistant to the Mayor."[5] Defendants argue additionally that because the Chester Home Rule Charter required that the Mayor "should not have been convicted of

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[5] Def.'s Mem. Supp. Mot. Dismiss at 12.

a crime classified as a misdemeanor of the second class or higher," it was reasonable to apply this same requirement to the Mayor's Administrative Assistant.[6]

This court finds that the Defendants had a legitimate purpose of promoting high standards of professional conduct in the position of Administrative Assistant to the Mayor because of the sensitivity of the position. This court also finds that the reduction of Plaintiff's salary was rationally related to that purpose because persons who have committed serious crimes in the

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[6] Id. (citing City of Chester Home Rule Charter, 323 Pa. Code § 11.2-202).

past have demonstrated a "greater potential for abuse" of rights and privileges. Schanuel, 546 F.Supp. at 525 (citing Dixon v. McMullen, 527 F.Supp. 711, 722 (N.D. Tex. 1981)); see, Upshaw v. McNamara, 435 F.2d 1188, 1190 (1st Cir. 1970) (person who has committed felony lacked the qualities of self control or honesty that the sensitive job of policeman requires). Thus, having found that Defendants' reduction of Plaintiff's salary was rationally related to a legitimate purpose, this court will dismiss Count IV of Plaintiff's Complaint.

Defendants argue next that Count V

and VI of Plaintiff's Complaint which allege claims under 42 U.S.C. §§ 1985(3) and 1986, respectively, should be dismissed for failure to state a claim for which relief can be granted. Count V of Plaintiff's Complaint alleges that "Defendants joined together in a conspiracy against Plaintiff to wrongfully and intentionally deny him a position in city government, because of Plaintiff's membership in the class of those who have paid their debt to society for prior criminal acts."[7] Count VI of Plaintiff's Complaint alleges: "Knowing of

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[7] Pl.'s Complaint at ¶ 76.

the conspiracy to perform the unlawful acts described hereinabove, Defendants . . . did nothing to prevent said acts, though having the power to do so."[8]

In order to state a cause of action under 42 U.S.C. § 1985(3), Plaintiff must allege four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

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8 Pl.'s Complaint at ¶ 79.

United Bd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 828-29 (1983) (citing Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)). The United States Supreme Court has interpreted the language of the second element requiring proof of intent to deprive equal protection, or equal privileges and immunities under the laws to mean "that there must be some racial, or perhaps otherwise class-based, invidiously[9] discriminatory animus behind the

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[9] The word "invidious" as used in the context of the term "invidious discrimination: means arbitrary, irrational and not reasonably related to a legitimate purpose. Black's Law Dictionary 826 (6th ed. 1990).

conspirators' action." Griffin, 403 U.S. at 102.

It appears from Plaintiff's Complaint that Plaintiff is unable, as a matter of law, to state a cause of action under § 1985(3). Plaintiff alleges that Defendants discriminated against him because he was a member of a class he defined as "those who have paid their debt to society for prior criminal acts." The Supreme Court has never held that animus based on prior felony convictions satisfied the class-based invidious discriminatory practice necessary to state a cause of action. This court finds

that discrimination allegedly based on Plaintiff being a prior felon fails to satisfy the requirement that there be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

Additionally, Plaintiff has failed to plead a conspiracy with sufficient factual particularity. In order to support a claim for conspiracy, plaintiff must allege facts showing particularly what acts a defendant performed to carry the conspiracy into effect, how these acts fit into the conspiracy, and how injury to the plaintiff

was foreseeable therefrom. Watson v. Clark, 716 F. Supp. 1354, 1358 (D. Nev. 1989), aff'd, 909 F.2d 1490 (9th Cir. 1990). Plaintiff has failed to allege facts indicating who were members of the conspiracy, when the parties agreed to the conspiracy, what acts the Defendants performed to carry out the conspiracy, and how these acts fit into the conspiracy. Additionally, Plaintiff has failed to allege precisely what laws of which he was denied equal protection or equal privileges or immunities. Count V of Plaintiff's Complaint will be dismissed. Because this court finds there is no basis

for Plaintiff's § 1985 claim, Plaintiff's § 1986 claim must likewise be dismissed. Brawer v. Horowitz, 525 F.2d 830, 841 (3d cir. 1976). Thus, Counts V and VI of Plaintiff's Complaint will be dismissed.

Counts VII through XI of Plaintiff's Complaint allege state law causes of action. In the absence of extraordinary circumstances, this court should refrain to exercise jurisdiction over pendent state law claims where federal claims have been dismissed under Fed. R. Civ. P. 12(b)(6). United Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1966); Cito v. Bridgewater

Twnshp. Police Dept., 892 F.2d 23, 25-26 (3d Cir. 1989). There are no extraordinary circumstances in this case justifying retention of pendent jurisdiction over Plaintiff's state law claims. Thus, counts VII through XI of Plaintiff's Complaint will be dismissed without prejudice to Plaintiff's refiling these claims in an appropriate state court action.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT HILL	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CITY OF CHESTER, et al.	:	**NO. 92-4357**
	:	

ORDER

AND NOW, this 18th day of March, 1993, in consideration of Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Plaintiff's Answer thereto, and the foregoing Memorandum, it is hereby ORDERED that:

(1) Defendants' Motion as to Counts I through VI of Plaintiff's Complaint is

GRANTED;

(2) Counts VII through XI of Plaintiff's Complaint are DISMISSED without prejudice to Plaintiff's refiling these claims in an appropriate state court action; and

(3) This action is DISMISSED.

BY THE COURT:

JAMES McGIRR KELLY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT HILL	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CITY OF CHESTER, et al.	:	**NO. 92-4357**
	:	

ORDER

AND NOW, this 10th day of June, 1993, in consideration of Plaintiff's Motion to Alter or Amend the Judgment, Defendants' Answer thereto, and the United States Supreme Court's decision in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993), and in consideration of this court believing that it applied an

inappropriate standard to Defendants' Motion to Dismiss, it is hereby Ordered that:

(1) Plaintiff's Motion to Alter or Amend the Judgment is GRANTED:

(2) this court's Memorandum and Order dated March 18, 1993 is VACATED;

(3) judgment in favor of Defendant is VACATED; and

(4) Plaintiff's Complaint is REINSTATED.

BY THE COURT:

_____

JAMES McGIRR KELLY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT HILL	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CITY OF CHESTER, et al.	:	**NO. 92-4357**

MEMORANDUM

J. M. KELLY, J. **AUGUST 26, 1994**

Presently before the Court is Defendants' Motion for Summary Judgment. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

On March 18, 1993, the Court granted Defendants' Motion to Dismiss the

Complaint. However, on June 10, 1993, the Court vacated this order, and reinstated the Plaintiff's complaint in its entirety.[1]

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[1] The Court took such action in response to the Plaintiff's Motion to Alter or Amend eh Judgment, in light of the United States Supreme Court's decision in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993).

In his response to Defendants' Motion for Summary Judgment, Plaintiff claims that the instant motion is "unsupported and unreasonable", purportedly because this motion consists of similar arguments as the Defendants' Motion to Dismiss. However, this Court has the ability to consider evidence outside of the pleadings in the instant Motion for Summary Judgment, applying a completely different standard of law than that applied to the pleadings in deciding the Motion to Dismiss. A careful analysis of this motion is certainly proper, as well as necessary under the law.

FACTS

Plaintiff, Robert Hill, a former Administrative Assistant to the Mayor of the City of Chester, brought this action against the City of Chester, Pennsylvania ("Chester"), the City Council of Chester (the "City Council"), and Annette Burton and Charles McLaughlin, both in their official capacities as members of the City Council and individually.

In 1992, Barbara Bohannan-Sheppard, the Mayor of Chester (the "Mayor"), appointed Plaintiff to be her Administrative Assistant pursuant to the Mayor's powers

under the Chester Home Rule Charter. The Administrative Assistant's duties included: organizing the office infrastructure, scheduling, answering telephones, attending and taking notes at meetings, supervising the word processing work of the Mayor's office, and following up matters for the Mayor with other governmental agencies. The Mayor was allegedly aware at the time of Plaintiff's appointment that Plaintiff had served a ten-year prison sentence for homicide charges brought when Plaintiff was fourteen years old, and that Plaintiff had also served a

sixteen-month prison sentence resulting from charges of engaging in intercourse with a minor. While incarcerated, Plaintiff earned a G.E.D. (the equivalent of a high school diploma) and became proficient in typing and other office skills. In the years following Plaintiff's release, he successfully pursued a career as a legal secretary/office manager and earned respect in the legal community in which he was employed. Plaintiff also married, had three children, and became a minister in the religion of Islam.

After plaintiff's appointment, ministers

of various religions in Chester and other individuals protested the appointment, pressuring members of the City Council to terminate Plaintiff's employment. On March 26, 1992, Councilwoman Annette Burton ("Councilwoman Burton") presented a motion before the City Council to remove Plaintiff from the City's payroll. This motion was seconded by Councilwoman Charles McLaughlin ("Councilman McLaughlin"). Councilwoman Burton withdrew her motion after the Solicitor of Chester advised her that the Administrative Assistant to the Mayor served only at the

pleasure of the Mayor, and therefore, that the City Council did not have the authority to terminate the Plaintiff. Subsequently, Councilwoman Burton moved instead to set Plaintiff's salary at zero, thereby effectively eliminating Plaintiff's continued employment with Chester. Councilwoman Burton's motion was seconded by Councilman McLaughlin, and the City Council voted two to one in favor of eliminating Plaintiff's salary. In addition, it is alleged that Defendant's withheld Plaintiff's pay for work performed up to the time Defendants introduced and passed the

motion which eliminated his salary. Plaintiff subsequently resigned from his position with the Mayor.

STANDARD OF LAW

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This court is required, in resolving a motion for summary judgment pursuant to Rule 56,

to determine whether "the evidence is such that a reasonable jury could return a verdict for a nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue

of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-13 (1986).

COUNT I - FIRST AMENDMENT

Defendants argue that Plaintiff has failed to provide adequate support for his claim of violation of his right to freedom of association under the First and Fourteenth

Amendments to the United States Constitution. The United States Court of Appeals for the Third Circuit addressed the issue of a violation of a government employee's right to freedom of association in Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988). The Third Circuit stated:

> Government employ-ment does not require an employee to forego the exercise of the right to freedom of association. Employees, however, who claim that adverse employ-ment action was taken against them based upon the exercise of their associational rights must show that they were engaged in constitutionally protected conduct, which conduct was a "substantial" or "motivating factor" in the government employer's decision.
>
> Two sometimes overlapping types of protected association have been

> recognized: associations founded on intimate human relationships in which freedom of association is protected as a fundamental element of liberty, and associations formed for the purpose of engaging in activities protected by the first amendment, such as the exercise of speech, assembly, and religion.

Id. at 1204 (citations omitted).

In light of this standard, this Court finds that Plaintiff has not sufficiently supported the claim of violation of his freedom of association. Plaintiff must assert that he was engaged in constitutionally protected conduct and that such conduct was a "substantial" or "motivating factor" in the decision to terminate Plaintiff's employment. It

appears to this Court that the substantial or motivating factor in Plaintiff's termination was not Plaintiff's association with the Mayor, but instead was Plaintiff's prior criminal record and the public reaction thereto. Hill claims that the action taken against him was motivated by his relationship with Bohannan-Sheppard, yet he provides no support for such a claim. In fact, Hill himself refers to such a claim as "rumors".[2]

Even if this Court were to find that Plaintiff's association with the Mayor was a

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[2] Dep. of Hill at 53.

substantial or motivating factor in Plaintiff's termination, Plaintiff has failed to demonstrate that he was engaged in activities protected by the Constitution. In order to fulfill this requirement, Plaintiff must assert that his employment by the Mayor was an association afforded constitutional protection. Not all associations are protected by the Constitution. As indicated in Rode, two types of associations have been recognized as requiring constitutional protection: associations founded on intimate human relationships, and those formed for the

purpose of engaging in activities protected by the First Amendment, such as exercise of speech, assembly, and religion. Id.

There has been no demonstration that Plaintiff's employment relationship with the Mayor falls within the category of an association founded on an intimate human relationship.[3] Moreover, Plaintiff's relationship with the Mayor does not implicate the protections afforded by the

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[3] Only relationships "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" are likely to implicate protection. Rode, 845 F.2d at 1204-05. Hill admits that his only relationship with Bohannan-Sheppard was as employee and friend. Dep. of Hill at 59-60.

First Amendment.[4] In addition, the mere fact that Plaintiff performed functions for a political figure does not necessarily make his job an association involving political expression. Accordingly, Defendants' Motion for Summary Judgment is granted for Count I of Plaintiff's Complaint.

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[4] As one court stated, "The court seriously doubts that the first amendment right to freedom of association is designed to protect employer-employee relationships; if it did, every firing of an at will employee, every breach or tortious interference with an employment contract, and every aspect of employer-employee relationships would have constitutional dimensions, and no court has adopted such a proposition." Fort Wayne Patrolmen's Benevolent Assoc. v. City of Fort Wayne, 625 F.Supp. 722, 728 (N.D. Ind. 1986).

COUNT II - DUE PROCESS LIBERTY INTEREST

Defendants argue that Plaintiff has not sufficiently supported Count II of his Complaint, which alleges a violation of Plaintiff's liberty rights as protected by the Fourteenth Amendment.[5] Plaintiff claims that Defendants violated his liberty interest by violating his "personal privacy and reputation at the hands of persons clothed with the authority of the state."[6]

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[5] The Due Process clause of the Fourteenth Amendment provides: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." U.S. Const. amend. XIV.

[6] Pl.'s Compl. at ¶ 46.

In Board of Regents of State College v. Roth, 408 U.S. 564 (1972), the United States Supreme Court determined that the Fourteenth Amendment did not require a hearing prior to the nonrenewal of a nontenured state teacher's contract unless the plaintiff could demonstrate that the nonrenewal deprived the plaintiff of a liberty or property interest. The Roth Court held that the nonrenewal of Plaintiff's contract was not tantamount to a deprivation of liberty, absent charges against him implicating his good name, reputation, honor, or integrity, and absent

any stigma or disability foreclosing other employment. Id. at 573-74. The Court further stated that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he is simply not rehired in one job but remains as free as before to seek another." Id. at 575 (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895-96 (1961).

Injury to one's reputation alone does not state a cause of action under the liberty interest of the Due Process Clause. See Paul v. Davis, 424 U.S. 693, 712 (1976). A liberty interest is only implicated when a

public employee is dismissed based upon charges or allegations which stigmatize the employee, and the employer creates and disseminates a defamatory impression about the employee in connection with the termination. Id. at 709-10.

In this case, Plaintiff claims that the City Council voted to reduce his salary to zero because of his prior criminal record and his association with the Mayor. He has not set forth any evidence that Defendants were responsible for his criminal record being publicized in the media. In addition, Plaintiff has not demonstrated that

Defendants have stigmatized his reputation in a manner which has harmed his ability to obtain future employment. In fact, soon after this incident, Plaintiff obtained employment similar to that which he maintained prior to employment with the City of Chester.[7] Thus, this Court finds that Plaintiff's liberty claim does not survive summary judgment. Accordingly, summary judgment is granted for the Defendants for Count II of Plaintiff's Complaint.[8]

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[7] Dep. of Hill at 5-9.

[8] In addition, there has been no evidence set forth to prove that Hill made a timely request for a hearing to clear his name, and that such request was denied. Dep. of Hill at 74-75. A request for such a hearing is a

COUNT III - DUE PROCESS PROPERTY INTEREST

Plaintiff also claims that his due process rights under the Fourteenth Amendment were violated because he had a property interest in his position as Administrative Assistant to the Mayor. In Board of Regents of State Colleges v. Roth, the Supreme Court defined a property interest protected by the Fourteenth Amendment as follows:

To have a property interest in a

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prerequisite to making a claim under the liberty interest of the Due Process Clause. See Freeman v. McKellar, 795 F. Supp. 733, 739 (E.D. Pa. 1993).

> benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> * * *
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S. at 577.[9] Thus, whether

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[9] In Perry v. Sinderman, 408 U.S. 593, 601 (1972), the United States Supreme Court held that a "person's interest in a benefit is a 'property' interest for due process purposes if there are . . . rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

Plaintiff had a property interest recognized by the Fourteenth Amendment is determined by reference to state law. Id.; see also Bishop v. Wood, 426 U.S. 341, 344 (1976). In Pennsylvania, absent an express statutory or contractual right granting tenure in public employment, a public employee remains "an employee at will who could be discharged at any time." Hoffman v. Montour County, 50 Pa. Commw. 101, 102, 411 A.2d 1319, 1320 (1980). In addition, Pennsylvania law provides that public employees have no contractual entitlement to be dismissed only for cause

unless the legislature has expressly provided tenure for a given class of employees. Rosenthal v. Rizzo, 555 F.2d 390, 392 (3d Cir.) (citing Mahoney v. Philadelphia Hous. Auth., 13 Pa. Commw. 243, 320 A.2d 459 (1974), cert. denied, 419 U.S. 1122 (1975)); cert. denied, 434 U.S. 892 (1977).

In the case at bar, Plaintiff served in his position as Administrative Assistant at the "pleasure of the Mayor" and his salary was to be set by the City Council.[10]

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[10] Section 305 of the City of Chester Home Rule Charter provides:

> The Mayor may appoint an assistant to assist in the administration of the functions of the Mayor. The

Plaintiff had no property interest in continued employment under the Chester Home Rule Charter because, serving at the "pleasure of the Mayor," Plaintiff had no legitimate claim of entitlement to continued employment with the Mayor. In addition, the City Council acted within its rights under the Chester Home Charter in reducing Plaintiff's salary. To the extent

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> Administrative Assistant will serve at the pleasure of the Mayor, shall be qualified by education and/or experience to carry out the duties of the office, and shall be compensated by a salary which shall be set by Council in the Administrative Code or other ordinance.

323 Pa. Code § 11.3-305 (1980).

that the City Council reduced Plaintiff's salary to an unreasonable level, Plaintiff can pursue state law claims for relief. The City Council's reduction of Plaintiff's salary does not ipso facto grant Plaintiff a property right to continued employment protected by the Constitution. On the contrary, Plaintiff can pursue whatever remedies are available for unreasonable reduction in Plaintiff's salary by the City Council. This Court finds that Plaintiff did not have a property interest in his employment as an Administrative Assistant with the City of Chester. Defendants' Motion for Summary

Judgment is granted for Count III of Plaintiff's Complaint.

COUNT IV - EQUAL PROTECTION

In Count IV of the Complaint, Plaintiff alleges a violation of his equal protection rights under the Fourteenth Amendment. Plaintiff's Complaint alleges that he was a member of a class of "persons convicted of felonies who have paid their debt to society and are now again members of the community," and that Defendants intentionally discriminated against Plaintiff because of his membership in that class.

The first step in evaluating an equal

protection challenge to a certain state action is to identify the level of scrutiny that must be applied. "Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate government purpose." Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 457-58 (1988) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973)).

~~This~~ Court finds that Plaintiff's employment with the Mayor did not implicate a fundamental right guaranteed by the Constitution, and Plaintiff's status as a convicted felon does not place him in a suspect class.[11] Thus, the rational basis test is the applicable level of scrutiny. See Schanuel v. Anderson, 546 F.Supp. 519, 524 (S.D. Ill. 1982) (rational basis test applied to challenge of state statute prohibiting

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[11] See Talley v. Lane, 13 F.3d 1031, 1034 (7th Cir. 1994); Hill v. Gill, 703 F.Supp. 1034, 1037 (D.R.I. 1989) ("In this case, it is clear that the class in question (i.e. persons convicted of felonies) is not a protected one. It is equally clear that public employment is not a fundamental right. Therefore, the applicable standard is the rational basis test.") (citations omitted), aff'd, 893 F.2d 1325 (1st Cir. 1989).

employment in certain jobs of convicted felon for period of ten years following conviction), aff'd, 708 F.2d 316 (7th Cir. 1983); Carbonaro v. Reeher, 392 F.Supp. 753, 757 (E.D. Pa. 1975) (rational basis test applied to challenge of state statute that required former felons to prove satisfactory character to receive financial assistance for postsecondary education); Butts v. Nichols, 381 F.Supp. 573, 579 (S.D. Iowa 1974) (rational basis test applied to challenge of state statute prohibiting employment of convicted felons in civil service positions).

The rational basis test is defined as

"whether the challenged state action rationally furthers a legitimate state purpose or interest." Rodriguez, 411 U.S. at 55. Thus, to withstand review, Defendants need only demonstrate that their actions in reducing Plaintiff's salary were rationally related to a legitimate state purpose. Defendants argue that the reasoning behind the reduction of Plaintiff's salary was that the Defendants did not want a convicted felon and highly controversial figure to be in the sensitive position of Administrative Assistant to the Mayor. In attempting to raise the business reputation of the City of

Chester to outsiders, Defendants felt that this issue may have hurt the City in its business dealings.[12]

This Court holds that the Defendants had a legitimate purpose of promoting high standards of professional conduct in the

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[12] During a public meeting on March 26, 1992, Councilwoman Burton stated:

> Over the past few months there has been one issue that has been allowed to linger much too long. In order for us to sell the City of Chester to outside business and industry, we must not allow a single issue to cloud the decisions that are made to stop us from becoming that great city that I know we can be. Robert Hill has become a single issue. I strongly support rehabilitation and employment of ex-offenders, but, that does not mean that one is entitled to any position that they want.

Defs.' Mot. for Summ. J., Ex. J.

position of Administrative Assistant to the Mayor because of the sensitivity and importance of the position. The Court finds that public protests to the appointment of Hill and the Council's concern regarding the protests' effect on the functioning of Chester city government motivated the Council's action.[13] In

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[13] When the media began to report Hill's prior convictions, the Defendants received telephone calls and requests for interviews from news organizations across the country, including "A Current Affair". Defendants received between approximately twenty and fifty phone calls every day from the media for a period of between three or four weeks. Dep. of McLaughlin at 21-27. In addition, each local television news program and "A Current Affair" were present at the City Council meeting of March 26, 1992. Pl.'s Resp. to Mot. for Sum. J., Ex. D at 4.

addition, persons who have committed serious crimes in the past have demonstrated a "greater potential for abuse" of rights and privileges. Schanuel, 546 F. Supp. at 525 (citing Dixon v. McMullen, 527 F. Supp. 711, 722 (N.D. Tex. 1981)); see also Upshaw v. McNamara, 435 F.2d 1188, 1190 (1st Cir. 1970) (person who has committed felony may lack the qualities of self control or honesty that the sensitive job of policeman requires).[14]

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[14] There is significant caselaw addressing the equal protection rights of ex-convicts. In rare instances, violations of employees' equal protection rights have been found in cases where employers have fired

employees due to their criminal record. See Furst v. New York City Transit Auth., 631 F.Supp. 1108 (N.D. Ca. 1980). However, in such cases, the employers' alleged reasons supporting the firings were overly general and not rationally related to any legitimate state interest.

For example, in Kindem, municipal janitor was discharged pursuant to a specific provision of the City Charter prohibiting any municipal employment of ex-felons. The court held that such a general policy violated the Equal Protection Clause. It stated:

> The City unquestionably has a legitimate interest in hiring qualified, competent and trustworthy employees, and in employing persons who will inspire the public's confidence. But it has not been demonstrated that the sole fact of a single prior felony conviction renders an individual unfit for public employment, regardless of the type of crime committed or the type of job sought. This is not to say that a prior felony conviction can never be a factor in public employment decisions. It is reasonable to assume, for example, that a prior conviction might be highly relevant or properly determinative

Thus, having found that Defendants' reduction of Plaintiff's salary was rationally related to legitimate purposes, this Court will grant Defendants' Motion for Summary

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> with respect to hiring decisions involving certain sensitive jobs.
>
> It may also be reasonable to assume that convictions for certain crimes may indicate that an individual is unfit for any future municipal employment. But the city's policy is not tailored along any lines to conform to what might be considered legitimate government interests.

502 F.Supp. at 1112 (citations omitted). The instant case does not involve such a general policy. Specific reasons were set forth supporting the decision to dismiss this specific employee from a specific paid position. In this case, the reasoning behind the action is rational, and satisfies the applicable constitutional standard. See, e.g., Darks v. City of Cincinnati, 745 F.2d 1040 (6th Cir. 1984); Schanuel v. Anderson, 708 F.2d 316 (7th Cir. 1983); Dixon v. McMullen, 527 F.Supp. 711 (N.D. Tex. 1981).

Judgment for Count IV of Plaintiff's Complaint.

COUNTS V, VI - 42 U.S.C. §§ 1985(3), 1986

Defendants argue that summary judgment should be granted in their favor for Counts V and VI of Plaintiff's Complaint, which allege claims under 42 U.S.C. §§ 1985(3) and 1986, respectively. Count V of Plaintiff's Complaint alleges that "Defendants joined together in a conspiracy against Plaintiff to wrongfully and intentionally deny him a position in city government, because of Plaintiff's membership in the class of those who have

paid their debt to society for prior criminal acts."[15] Count VI of Plaintiff's Complaint alleges, "Knowing of the conspiracy to perform the unlawful acts described hereinabove, Defendants . . . did nothing to prevent said acts, though having the power to do so."[16]

In order to state a cause of action under 42 U.S.C. § 1985(3), Plaintiff must allege four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the

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15 Pl.'s Compl. at ¶ 76.

16 Pl.'s Compl. at ¶ 79.

> laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Bd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983) (citing Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)). Section 1985 (3) provides a cause of action where it is shown that a conspiracy existed to deprive a plaintiff of her constitutional rights.[17] Because no

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[17] In addition, § 1985 only provides for liability when a conspiracy is based on racial or otherwise class-based discriminatory motives. Carchman v. Korman Corp., 594 F.2d 354, 355 (3d Cir.) (citing Griffin, 403 U.S. at 102), cert. denied, 444 U.S. 898 (1979).

such deprivation of constitutional rights occurred in this case, summary judgment is granted to all Defendants for Count IV.

This Court will also grant the

Plaintiff alleges that Defendants discriminated against him because he was a member of the class he defined as "those who have paid their debt to society for prior criminal acts." The Supreme Court has never held that animus based on prior felony convictions satisfies the class-based invidious discriminatory practice necessary to state a cause of action. Moreover, it has been held in this district that "[section] 1985(3) may be invoked only as a remedy for discrimination which is based upon the plaintiff's immutable characteristics, such as race or gender." Rourke v. United States, 744 F.Supp. 100, 105 (E.D. Pa. 1988) (rejecting "former arrestees as class member § 1985(3)), aff'd, 909 F.2d 1477 (3d Cir. 1990). This Court finds that discrimination allegedly based on Plaintiff's status as a prior felon fails to satisfy the requirement that there be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the alleged conspirators' action.

Defendants' motion for Count V of Plaintiff's Complaint. Because this court finds there is no basis for Plaintiff's § 1985 claim, summary judgment will likewise be granted for Count VI. See Brawer v. Horowitz, 535 F.2d 830, 841 (3d Cir. 1976).

COUNT VII-XI - STATE LAW CAUSES OF ACTION

Counts VII through XI of Plaintiff's Complaint allege state law causes of action. This Court may refrain from exercising jurisdiction over pendent state law claims where all federal claims have been dismissed. 28 U.S.C. § 1367(c)(3) (Supp. 1993). There are no extraordinary

circumstances in this case justifying retention of pendent jurisdiction over Plaintiff's state law claims. Thus, Counts VII through XI of Plaintiff's Complaint will be dismissed without prejudice to Plaintiff refiling these claims in an appropriate state court action.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT HILL	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CITY OF	:	**NO. 92-4357**
CHESTER, et al.	:	

ORDER

AND NOW, this 26th day of August, 1994, in consideration of Defendants' Motion for Summary Judgment, Plaintiff's Response, Defendants' Supplemental Memorandum, and Plaintiff's Supplemental Response, and for the reasons stated in the foregoing memorandum, it is hereby ORDERED that:

1. Defendants' Motion for Summary

Judgment is GRANTED for Counts I through VI.

2. Counts VII through XI of Plaintiff's Complaint are DISMISSED without prejudice to Plaintiff refiling these claims in an appropriate state court action.

3. Judgment is entered in favor of Defendants City of Chester, City Council of Chester, Annette Burton and Charles McLaughlin and against Plaintiff Robert Hill for Counts I through VI.

BY THE COURT:

_____

JAMES McGIRR KELLY, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1955

ROBERT HILL,

Appellant

v.

CITY OF CHESTER; THE CITY COUNCIL OF THE CITY OF CHESTER; ANNETTE BURTON, Individually and in her official capacity as Councilwoman of the City of Chester; CHARLES McLAUGHLIN, Individually and in his official capacity as Councilman of the City of Chester

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Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 92-4357)
District Judge: Honorable James McGirr Kelly

ARGUED May 5, 1995
Before: MANSMANN, SCIRICA and McKEE,
Circuit Judges

JUDGMENT ORDER

After consideration of all the contentions raised by the appellant, to wit, that:

1. the district court erred in making the credibility determination that appellant's affiliation with Chester Mayor, Barbara Bohannan-Sheppard, was not sufficient to implicate First Amendment rights in appellant's discharge;

2. the district court erred in finding

that persons convicted of crimes who served their sentences for such crimes do not constitute a "suspect class" for equal protection purposes;

3. the district court erred in granting the appellees' Motion for Summary Judgment as to appellant's equal protection claims, based upon an improper credibility determination that appellant's secretarial duties constituted a "sensitive" position in Chester government, thereby supplying a "rational basis" for appellees' discharge of appellant;

4. the district court erred in finding

that appellees did not violate appellant's right of due process; and

5. the district court erred in holding that appellant was not entitled to the protections of the Enforcement Act of 1871, 42 U.S.C. §1985(3) and the Civil Rights Act of 1871, as amended, 42 U.S.C. §1986, it is,

ADJUDGED AND ORDERED that the judgment of the district court entered August 26, 1994, be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

_____

Circuit Judge

Supreme Court, U.S.
FILED
SEP 8 1995
OFFICE OF THE CLERK

No. 95-236

In The

Supreme Court of the United States

October Term, 1995

ROBERT HILL,

Petitioner,

vs.

CITY OF CHESTER, PENNSYLVANIA: THE CITY COUNCIL OF THE CITY OF CHESTER, ANNETTE BURTON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS COUNCILWOMAN OF THE CITY OF CHESTER; AND CHARLES MCLAUGHLIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COUNCILMAN OF THE CITY OF CHESTER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Are the Equal Protection Rights of an individual abridged where the individual is terminated from an appointed at-will government employment position of administrative assistant to the Mayor due to adverse publicity, protests and questioning of the judgment of government leaders, following disclosure of the facts and circumstances surrounding the individuals prior criminal convictions for murder and rape, all of which were perceived by government decision makers as hampering the effective operation of government.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Counterstatement of the Case	1
Reasons for Denying the Writ	6
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

BHD of Carpenters and Joiners v. Scott, 463 U.S. 825, 77 L. Ed. 2d 1049, 103 S. Ct. 3352 (1983)	9
Bray v. Alexandria Women's Health Clinic, __ U.S. __, 122 L. Ed. 2d 34, 113 S. Ct. 753 (1993)	9
City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 87 L. Ed. 2d 3313, 105 S. Ct. 3249 (1985)	9, 10
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976)	9

Statutes Cited:

18 Pa. C.S.A. § 9125	9

Contents

	Page
42 U.S.C. § 1983	9
42 U.S.C. § 1985(3)	7, 9
42 U.S.C. § 1986	7, 9
United States Constitution Cited:	
Fourteenth Amendment	i
Rule Cited:	
IOP's Rule 5.5	6
Other Authority Cited:	
Delaware County Daily Times	2, 3

I

COUNTERSTATEMENT OF THE CASE

Defendants ("Respondents" herein) Annette Burton and Charles McLaughlin ran for City Council as Democrats together with present Chester Mayor, Barbara Bohannon-Sheppard during the 1991 City wide election. The Burton, McLaughlin and Bohannon-Sheppard ticket was ultimately successful and for the first time in the City of Chester, Democrats held a majority of seats on the Chester City Council. The Plaintiff ("Respondent" herein), Robert Hill, met Bohannon-Sheppard one to two years prior to her run for office either through Hill's wife or through the Mayor's husband who ran an auto repair shop. (App. at 25a-26a). Hill, who was employed at the time by a Philadelphia law firm as a legal secretary, did not work on the Mayor's campaign, did not attend any campaign functions, nor had he ever been involved in politics before the Mayor's election. (App. at 20a, 27a, 28a). The full extent of Hill's involvement in the election of the Mayor was on one or two occasions when he walked with her in his neighborhood as she campaigned for office. (App. at 29a). Hill attended no fund-raising or campaign events and in fact had not voted prior to the 1991 election. (App. at 28a-29a).

Prior to the 1991 election, Bohannon-Sheppard indicated to Hill that, if elected, she wished that he serve as her Administrative Assistant. (App. at 31a). When the Mayor made this comment to Hill, she was unaware of Hill's prior convictions for the murder and subsequent rape of local Chester citizens. (App. at 41a). Even when Hill did tell the Mayor of these convictions after she had won election and after she, as the Mayor, had already publicly agreed to place Hill in the position of Administrative Assistant, he did not give her any details of the crimes he had committed. (App. at 43a). Further, despite attending transition meetings and general governmental organizational meetings with other council members including Defendants, Burton and McLaughlin, Hill never told the Defendants of his criminal record or the underlying

facts until after articles and editorials began appearing in the local newspapers.[1] (App. at 53a-54a). Hill was aware from the outset that, if he intended to serve in the position of Administrative Assistant to the Mayor, there would be public outcry and protest, his name and the facts surrounding criminal background would be exposed in the press and there would be political opposition to his appointment. (App. at 45a-46a).

Shortly after Hill's appointment became public, ministers of various religious faiths in the City of Chester, the families of Hill's victims and other individuals organized protests of Hill's appointment and as Hill admits, had the effect of "bringing pressure to bear on the members of the City Council to terminate his employment." (App. at 327a, ¶ 19). In addition to the protests of church leaders, editorials and articles seriously questioning the propriety of Hill's appointment appeared in the local papers which served the City.[2] These editorials and articles focused,

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1. The following account appeared in the February 6, 1992 *Delaware County Daily Times*: "Hill was fourteen when he committed the murder. He pleaded guilty and served ten years of a 10 to 20 year term in prison. Hill hit Izzo on the head with a large ball peen hammer then stabbed him 18 times with a butcher knife and stuffed the body in his bedroom closet, where it remained for six days before Hill's father made the gruesome discovery." (App. at 43a).

2. On January 24, 1992, an editorial appearing in the *Delaware County Daily Times* addressed the Hill appointment as follows:

> How does a freshman chief executive soft peddle the appointment of a convicted killer and rapist to a key position in her fledgling administration?
>
> She doesn't.
>
> She broadcast it. Loudly. Proudly.
>
> * * *

(Cont'd)

inter alia, upon the grisly and heinous nature of the Plaintiff's crimes.[3]

The entire text of January 24, 1992 editorial was attached to Defendants' Motion for Summary Judgment as Exhibit "F" in the Trial Court.

(Cont'd)

Come on Mayor!

The last thing Chester needs is another stupid, time-consuming, image-tainting scandal.

* * *

In our view, it is the height of hypocrisy to appoint Hill to an important government position, characterizing him as a shining example of the rehabilitated man, while families continue to grieve over his misdeeds.

Make no mistake, Mr. Hill didn't have his act put together 28 years ago when — at the age of 14 — he used first a hammer and then a knife to brutalize and murder insurance agent Patrick Izzo, and then after killing him, to stuff his corpse in a bedroom closet where he would use it for the better part of a week like some grisly and macabre automated teller.

* * *

3. On February 5, 1992, a column in the *Delaware County Daily Times* read as follows:

Hill has admitted the killing of Izzo, but has maintained his innocence on the rape charge, claiming it was a consensual act. Hills' version of the sexual encounter

(Cont'd)

The official reaction of the Respondents and other members of the new administration was to stand behind Hill with the expectation that press coverage would eventually end. (App. at 55a-56a). Councilman McLaughlin went so far as to meet with Hill to prepare for a meeting with one of the most vocal protesters of Hill's appointment as Administrative Assistant to the Mayor, Reverend Strand. (App. at 61a).

The official minutes of several Council Meetings of the City of Chester similarly reflect public outcry regarding the appointment of Hill as the Mayor's Administrative Assistant. (App. at 313a). The overwhelming negative outcry and publicity regarding Hill's appointment and the corresponding negative effect on the efficient functioning of City Government reached its nadir at the public Council Meeting on March 26, 1992 attended by all three Philadelphia TV news programs and the nationally syndicated show "A Current Affair". (*See* Memorandum Opinion below at A-78, fn 13).

At this meeting, Councilwoman Annette Burton presented a Motion before City Council to remove Hill from the City's payroll. The Motion was seconded by Councilman Charles McLaughlin, but was withdrawn upon the advice of the Solicitor of the City of Chester "that the Administrative Assistant to the Mayor served only at the pleasure of the Mayor." (App. at 315a). The minutes of the Council Meeting reflect the reasons given by Councilwoman Burton for the actions she initiated that day:

> Councilwoman Burton made a statement which she said took hours of thought and

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(Cont'd)

> doesn't jibe with police and witness accounts of the crime. According to those accounts, Hill's victim was screaming for help and Hill had to be beaten with night sticks to get him off her.

> prayer. Some of you that know me will understand, others, I pray that you do understand. Today I find myself at a crossroad with the people of this City. This City that I call home, elected me, and entrusting (sic) me to do what I think is in the best interest of them. One of the things that I promised during the campaign was if I felt something was wrong, I would stand up and say what was wrong. Over the past few months there has been one issue that has been allowed to linger much to long. In order for us to sell the City of Chester to outside business and industry, we must not allow a single issue to cloud the decisions that are made to stop us from becoming the great city that I know we can be. Robert Hill has become a single issue. I strongly support rehabilitation and employment to ex-offenders, but that does not mean that one is entitled to any position that they want. I will support Robert Hill becoming employed, but, not put in the position of Assistant to the Mayor. My position on this matter was not one that was easy for me to come to, but, I was elected to do what I feel is best for my City and I can know (sic) longer justify keeping Mr. Hill in his present position. So, I make a motion to [remove] Robert Hill from the payroll from the City of Chester. (App. at 315a).

Subsequently, Councilwoman Burton moved, instead, to set Hill's salary at zero, thereby effectively eliminating Hill's continued employment with the City. This motion was seconded by Councilman McLaughlin and City Council voted 2 to 1 in favor of eliminating Hill's salary.

Hill admitted that other than the act of voting to set his salary at zero, he had no proof that the Appellee's acted with any malice towards him, that he is still on speaking terms with Defendant Burton and that neither Defendant Burton nor McLaughlin held any personal animosity toward him. (App. at 70a, 88a-90a). Hill's chief complaint concerning the Councilpersons' conduct was that they did not personally tell him that they were going to vote to set his salary at zero prior to taking their action. (App. at 71a).

Since Hill was under Pennsylvania law an employee at will, he could be discharged for any reason or no reason at all. As the Trial Court found, Hill had no property interest in this employment. (*See* Memorandum Opinion at A-68-70).

Following this meeting, Hill never requested a hearing regarding the City Council's decision. (App. at 84a-87a). Subsequently, an Ordinance was adopted by a vote of 4 to 1, completely eliminating the position of Administrative Assistant to the Mayor.

REASONS FOR DENYING THE WRIT

The Judgment Order of the Third Circuit Court of Appeals and the Memorandum Opinion of the District Court, both unpublished[4], do not conflict with the decision of any other United States Court of Appeals, do not decide any Federal Question in a way in conflict with the Supreme Court of Pennsylvania, do not depart from the accepted and usual course of judicial proceedings, nor do they depart from the pronouncements of this Honorable Court.

Contrary to the Petitioners framing of the questions

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4. Unpublished Judgment Orders are of no precdential value. *See* Third Circuit Court of Appeals, IOP's Rule 5.5

presented for review, this case presents no ruling of broad based implication beyond the facts presented to the District Court, upon which summary judgment was entered in favor of the Respondents by the District Court in a well-reasoned decision. Petitioner totally failed to establish *any* factual support for any of the claims brought under federal civil rights statutes. Thus, this Court need not reach the question of whether persons convicted of crimes constitute a "suspect class" for equal protection purposes, nor whether "conspiracies" motivated by other than "racial bias" may be actionable under 42 U.S.C. §§ 1985(3) and 1986, as the proven facts of this case simply don't establish such claims.

The simple and limiting facts of this case are that Robert Hill, a person convicted of murdering a local businessman and raping a local minor was, several years later, an at-will employee of the City of Chester in a position of some public prominence. As an employee at-will he could be terminated for any reason or no reason at all, and had no continuing expectation of employment. For that reason the trial court found that Hill had no protected liberty or property interest, and those rulings are not challenged herein.

The conduct of the Respondents claimed to be a violation of the Petitioner's equal protection rights was the act of effectuating Hill's dismissal from City Government when it became apparent that the public disclosure of the facts and circumstances surrounding his criminal conduct, for which he had been convicted was having an adverse impact on the effective operation of city government. The decision to effectively terminate Hill's employment by setting his salary at zero was an individual decision based upon the facts of Hill's particular case. Those facts included not merely that he was an ex-convict, but that he had committed a rather heinous murder within the City as well as a rape after being released from prison following the

original murder conviction. This decision was also based upon public protests, editorials and demonstrations, calling into question the quality of the leadership of the City Government and hampering local government's operation and business dealings with other agencies. The evidence presented to the lower court included Hill's admission that the individual counselperson Respondents, Annette Burton and Charles McLaughlin, had first supported Hill's continuing employment in the position of Administrative Assistant even after discovering his criminal convictions, and a statement made by counselwoman Burton that she was in favor of Hill's continuing in an employment position other than Administrative Assistant to the Mayor.

The trial court found that City Council acted within its right under the Chester Home Rule Charter to reduce Plaintiff's salary (Memorandum Opinion at A-70) and that the Respondents "had a legitimate purpose of promoting high standards of professional conduct in the position of Administration Assistant to the Mayor . . . [and that] public protests to the appointment of Hill and the Council's concern regarding the protests' effect on the functioning of Chester city government motivated the Council's action." (Memorandum Opinion at A-77-78). Simply put the Trial Court found "specific reasons were set forth supporting the decision to dismiss this specific employee from a specific paid position." (Memorandum Opinion at A-81; citation omitted).

The Petitioner seeks to obtain this Court's review of the entry of Summary Judgment based on these particular facts, by claiming that his mere membership in the class of convicted felons was a substantial or motivating factor in his termination from employment. As the court below observed, however, nothing could be further from the truth. It is not necessary for this Court to reach the issue of whether convicted felons should be deemed a "suspect class" under equal protection analysis. The trial court's opinion addresses in great detail the current status of

equal protection jurisprudence under §§ 1983, 1985(3) and 1986. (Memorandum Opinion at A-72-86).

Where this Honorable Court has denied suspect class status on the basis of age (*Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976)); mental status (*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 87 L. Ed. 2d 3313, 105 S. Ct. 3249 (1985)); economic or commercial classifications (*BHD of Carpenters and Joiners v. Scott*, 463 U.S. 825, 77 L. Ed. 2d 1049, 103 S. Ct. 3352 (1983)). Women seeking abortion (*Bray v. Alexandria Women's Health Clinic*, __ U.S. __, 122 L. Ed. 2d 34, 113 S. Ct. 753 (1993)); clearly ex-convicts should not be considered a suspect class where their inclusion in this class is due to their own volitional violation of the laws of society. Similarly, the classification of "ex-felons" can include a wide variety of criminal offenses representing not only economic misconduct but including crimes of personal violence which can be the result of pathology representing permanent mental illness or sexual disfunction. For these reasons and many others, no District Circuit Court of the United States has ever suggest that "ex-felons" be given suspect class protection.

The State of Pennsylvania like several other states has enacted a statute specifically permitting the consideration of felony and misdemeanor convictions by prospective employers to the extent that they relate to the applicant's suitability for employment in the position for which they have applied. (18 Pa. C.S.A. § 9125). This Statute can be seen as requiring merely a rational basis upon which to form an employment decision concerning one with a criminal record. Judge Kelly in the instant case, specifically found that the Respondents had a rational basis for their effectuation of the termination of the Petitioner's employment. As this Court stated in *Cleburne*, the decision reached by the government must be "rationally related to a

legitimate government purpose . . . [and may not be] so attenuated as to render the distinction arbitrary or irrational" *Id.* at 473 U.S. 446. Clearly, the District Court was correct in finding that the Respondents' interest in the effective and efficient operation of government and the perception of the responsibility of the local government decision-makers by the business partners and the public the government served were a rational basis for terminating Hill including consideration of the particular circumstances of his criminal convictions. This is particularly true where there has been no showing whatsoever that the Respondents acted with animous toward convicted felons in general, but merely to this particular ex-felon and the effect of his appointment to a particular position on the City Government.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

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